SUPREME COURT, U.S.

No. 490

AUG 15 1967

JOHN F. DAVIS, CLE

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

DAVIS LEE, PETITIONER

vs.

J. C. RITSCH, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

DAVIS LEE
Petitioner
Post Office Box 653
Orangeburg, South Carolina

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STATE STATUTES

Georgia Codes, 39-1204, 81-206, 81-207, 81-208.

OTHER AUTHORITIES

American Jurisprudence, Vol. 16, 2nd, Page 963 and Page 941; C. J. S. Vol. 16A, Page 572.

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OPINION OF THE COURT BELOW

The opinion of The United States Court of Appeals Fifth Circuit, was reported April 17, 1967, as Davis Lee, Plaintiff-Appellant, vs. J. C. Ritsch, Et Al, Defendant- Appellees.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submis-

sion by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Davis Lee, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, C. 646, 62 Stat. 928. Providing that this Court, by Writ of Certiorari, review any final Judgment or Decree rendered by The United States Courts of Appeal.

In this Cause Petitioner set up and claimed that he has been deprived of property without Due Process of law as guaranteed by The Fifth and Fourteenth Amendments to The U. S. Constitution. Petitioner asserts that the Per Curiam Decision of The United States Court of Appeals, Fifth Circuit, is not in accord wth applicable decisions of this Court.

QUESTIONS INVOLVED

1. Whether the Petitioner was deprived of his property without Due Process when Respondents dispensed with notice?
2. Did the Justice of Peace have jurisdiction to issue Distress Warrant when affidavit lacked jurisdictional

facts as required by The Georgia Code?

3. Did the Judge of The City Court of Valdosta have jurisdiction to issue quick order sale without notice?

4. Did The District Court err in refusing to follow the Statutory laws of Georgia and the Decisions of its highest Courts?

5. Did the U. S. Court of Appeals err in holding in an identical case that District Court must follow State law, and by upholding the failure of District Court to do so in case at bar?

STATEMENT OF THE CASE

Petitioner is a Citizen of South Carolina. In October, 1960, he rented a building from one J. C. Ritsch, Valdosta, Georgia, to store a Printing Plant valued at $20,000.00. He paid the Respondent one Month's rent in advance, subsequently, he paid 7 more months rent, making a total of $450.00 at $75.00 per month.

On January 25, 1963, Respondent made Affidavit with Justice of Peace for Distress Warrant. The property was levied on by the County Sheriff. On February 8, 1963, Respondent filed Affidavit with Valdosta City Court for Quick Order Sale. Request was granted, and the sale was held February 20, 1963 at Court House and land-lord-Respondent bought Plant for $1500.00.

State law requires that property owner be notified and that such property must be advertised in the Newspaper. Respondents admit that requirement of law was waived, and no notice was even attempted.

Petitioner on July 31, 1963, filed Complaint for Trover

and Conversion in The United States District Court at Macon, Georgia, because of Diversity of Citizenship. Petitioner filed several Motions to have District Court set the sale aside as a Void sale. All Motions were denied. The District Judge admitted in an Order filed March 10, 1964, that the court that ordered quick order sale lacked jurisdiction, and the sale was void, yet he refused to set sale aside.

The District Court set the Cause down for trial on Petitioner's Complaint, but the petitioner advised the court that such a trial would give validity to a void sale, and he did not appear. The Court, at request of Respondent, dismissed the Complaint with prejudice for lack of prosecution.

STATUTE AND DECISION INVOLVED

This Petitioner's Contention in Argument before U. S. Court of Appeals was that under Georgia law the District Court was required to set the void sale aside. Georgia Code Sections 81-206, 81-207, 81-208, and Georgia Code 39-1204, Section 39-1203 and 39-1204, provides for giving of notice and the District Court in a Diversity action cannot completely ignore the provisons of a State Statute, and the decisions of the state highest courts; and dismiss a suit because the Plaintiff decides not to participate in an action that the weight of authority opposes.

The Court of Appeals in this cause is inconsistent. In a similar case, Birkett L. Williams Company vs. Smith, cited as 353 F 2nd 60 (1965) The same court held that "The law of the place where property is situated at the time of Conversion governs an action in Trover.

The Court continued: "The real problem here, therefore, is the determination under Georgia law of the liability of an auctioneer for conversion."

Further the court said: "In the absence of the all encompassing case in point, sitting as a Federal Appellate Court, we are forced in this Diversity action as best we can to determine if the District Court applied the law as would the Georgia Courts of Last Resort."

The Court adopted a different yard stick and a different set of Rules when it decided this Petitioner's Cause. Did the fact that he is a Negro and a non-member of the bar, cause the U. S. Court of Appeals to cover up the prejudicial errors of The District Court?

Not only does the Georgia Code make the giving of notice mandatory, but the state's highest courts have held that without notice the lower courts would lack jurisdiction, and such sales are void.

In Cohen vs. Candler 14 S. E. 193-88 G-207, The Supreme Court of Georgia, set aside the sale, and held: "A mere description in the affidavit and Distress Warrant of rental property will not serve as a substitute for alleging the tenant's residence in the county, or the presence of his property therein, as a jurisdictional fact."

In all of his Motions and Briefs the Petitioner continued to remind the court of the decisions of the state's highest Courts.

The Petitioner wishes to call this court's attention to the Transcript of Record, page 56. The Respondent claims in his Answer that he made telephone calls, sent western

union wires, and that a reasonable effort was made to give this petitioner notice.

The District Court requested Briefs on the lack of notice and a void sale. On page 98 of The Transcript of Record the Respondent tells an entirely different story. He admits that no effort had been made to give notice; that the giving of notice and complying with The Georgia Statutory requirements had been dispensed with.

But because this Petitioner insisted upon The District Court applying the state law and the decisions of the state's highest courts, he was penalized with a dismissal of his cause with prejudice for lack of prosecution, and The U. S. Court of Appeals in its Per Curiam opinion, condemned this Petitoiner for trying to protect his interest as best he could, and denied him his day in court.

DUE PROCESS GUARANTEES OF 5TH AND 14TH AMENDMENTS

Petitioner does not believe that even a legislative taking can be had without notice and a hearing, for even a legislature must afford due process. In this case the Justice of The Peace did not have jurisdiction to issue the Distress Warrant, and the city Judge of Valdosta did what the legislature could not do — dispense with notice and issue a quick order sale.

The effect of the Due Process guaranty, according to The United States Supreme Court in Ochoa vs. Henandez Y. Morales, 230 U. S. 139, 57 L. Ed. 1425, 335 S. ct. 1033:

"The effect of the guaranty is to prohibit the taking of one person's property, and giving it to another, contrary

to settled usages and modes of procedure, without notice and opportunity for a hearing."

Due Process of law has been denied throughout this case. It started with the arbitrary, oppressive and unjust proceedings in the inferior courts of Valdosta, and then ended in The Federal District Court because the court objected to this petitioner acting as his own counsel. Judicial absolutism is not a part of The American way of life.

When Rule 64 of The Federal Rules of Civil Procedure makes the remedy of attachment available in The Federal District Courts in the manner provided by the law of the state, in which the district court is held, subject to the qualification that any existing statute of The United States governs to the extent to which is applicable—

Fitzpatrick vs. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 S. ct. 369; Tilton vs. Cofield, 93 U. S. 163, 23 L. ed. 858.

Then, in our judgment, the court errs when it doesn't follow the state law.

Here are a few interpretations by the state's highest courts. In W. W. Kimball Co. vs. Rodgers, 93 SE 32, Court of Appeals of Georgia: "A Distress Warrant may be issued by any Justice of The Peace in county in which the defendant resides or has property. Unless one of the jurisdictional facts is set up, originally or by Amendment in the affidavit upon which the warrant is based, the warrant is void."

That in Cohen vs. Candler, 14 SE 193—The Supreme Court of Georgia, in an earlier decision held the warrant was void for failure to show any jurisdictional facts.

The Supreme Court of Georgia held, "That Georgia's

Statutory law and its highest court prohibit maintenance of actions where the court lacks jurisdiction—Ga. R. R. and Banking Co. vs. Redwine, June 1, 1951, 66 SE 2d 243.

"It is argued by counsel for the plaintiff in error that the trial court had no jurisdiction to entertain an Appeal in this case from the state Revenue Commissioner's decision. If that is true, the judgment is a nullity and must be reversed. Code 110-709; Head vs. Bridges, 67 Ga. 227; Fussell vs. Dennard, 118 Ga. 270; 45 SE 247; Jones vs. Smith, 120 Ga. 642; 48 SE 134; Franklin County vs. Crow, 128 Ga. 458, 57 SE 784. The parties to litigation cannot give to a court jurisdiction of the subject matter of a suit when it has none by law, and when a trial court, in a case over which it has as to subject matter no jurisdiction, renders therein any judgment except one of dismissal, and the case is brought here for review upon a Writ of error, this court will of its own motion reverse the judgment whether exception to it for want of jurisdiction in the court below be taken in the bill of exception or not."

That is the position of this Petitioner. In view of the doctrine laid down by The United States Supreme Court in Erie R. Co. vs. Tompkins, 58 S. ct. 817 that The District Court in this case should have followed the Georgia courts and set the sale aside on its own motion. See Harris vs. McDaniel, 88 SE 2nd 442.

We think that we have demonstrated above that the cases cited by The Georgia Courts are clear authority for the proposition that Petitioner, a non-resident, had a right to notice, and while we feel that notice by publication would be constitutionally deficient, even notice by publication, if it followed the provisions of the Georgia Code

and marked copies of the publicatons were mailed to the property owner, that would have been better than no notice at all.

Most all of the recent decisions do not rely any longer on distinctions between in rem and in personam judgments or between resident and non-residents. The more clearly recognized that the question is not the power of the state to secure jurisdiction and enforce judgments, but whether the notice and opportunity to be heard were so lacking as to be repugnant to due process of law; whether the notice and opportunity for a hearing were in fact fair under the circumstances.

We refer to Mullane vs. The Central Hanover Bank and Trust Co., 339 U. S. 306, 70 S. ct. 652 and The City of New York vs. New York, N. H. H. R. Co., 344 U. S. 293, 73 S. ct. 299. The Mullane Case held that the distinction between actions in rem and actions in personam was an artificial distinction which did not solve the problem of what was adequate notice under the due process clause of the fourteenth Amendment, said the court:

"But in any event we think that the requirements of the Fourteenth Amendment to The Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of the law, or on other issues, or the reasoning which underlies them, we do not rest the power of the state to resort to constructive service in this proceeding upon how its courts or this court may regard this historic antithesis. It is sufficient to observe that,

whatever the technical definition of its chosen procedure, the interest of such state in providing means to close trust that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard." 339 U. S. at 312-313.

We submit that the notice in the case at bar was arbitrarily, purposely, intentionally dispensed with by the city court of Valdosta, and there is no excuse in reason or in law why this Petitioner was not given some form of notice. The residents and address of this property owner was known as the record shows. Respondents have no where contended that they had tried to notify him by mail. They have not contended, and offered not one scintilla of evidence that they tried to give notice by publicaton. They said notice was dispensed with.

That this case represents the ultimate example of arbitrary procedure in violation of due process of law is seen from an early opinion of The United States Supreme Court delivered by Mr. Justice Holmes, in which just this problem was pointed out. Said the court, "It was said that, construed as we construe it, the statute would be satisfied if a single publication were made. The answer is that the court fixes the notice and will see that no injustice is done; Newman vs. Lynchburg Invest Corp., 236 U. S. 692, 696, 35 S. ct. 477. The reductio Ad absurdum of Mr. Holmes has come to pass in the case at bar. What we have here is an extreme example of arbitrariness. We believe that the actions of the courts below cannot stand. The long and short of it is that this Petitioner never re-

ceived a notice that his property had been attached or that a quck sale had been ordered. He was deprived of his property without due Process.

Davis Lee, Petitioner and Counsel
Post Office Box 653
Orangeburg, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been mailed to counsel for opposing party.

This 11th day of August, 1967.

Davis Lee